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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 464

THE PENNSYLVANIA RAILROAD COMPANY,
Appellant,

v.

THE BALTIMORE AND OHIO RAILROAD COMPANY, et al., Appellees.

On Appeal from the United States District Court for the District of Maryland

APPELLANT'S BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM

GUERNSEY ORCUTT,
RICHARD R. BONGARTZ,
Transportation Center,
6 Penn Center Plaza,
Philadelphia 6, Pennsylvania.

WILLIAM PEPPER CONSTABLE,
GEORGE W. CONSTABLE,
701 Maryland Trust Building,
Calvert and Redwood Streets,
Baltimore 2, Maryland.

Attorneys for The Pennsylvania Railroad Company.

NOVEMBER 6, 1957

PRESS OF ALLEN, LANE & SCOTT, PHILADELPHIA

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No. 464

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

APPELLANT'S BRIEF IN OPPOSITION TO MOTIONS TO AFFIRM

This brief is filed by appellant, pursuant to Rule 16, paragraph 3, of the Revised Rules of the Supreme Court, in opposition to the motions to affirm filed by appellees, The Baltimore and Ohio Railroad Company and Western Maryland Railway Company, Canton Railroad Company, and Maryland Port Authority and Baltimore Association of Commerce, to the extent that such motions are directed to this appeal.

STATEMENT

As stated in appellant's Jurisdictional Statement, and as seems to be conceded by appellees, this appeal does not require the Court to examine and re-evaluate the evidence. The questions presented relate to the basic issues as to the respective responsibilities of the Interstate Commerce Commission and a court reviewing its orders. Indeed, the motions to affirm serve rather to underscore the substantial nature of the questions raised by this appeal—(1) whether the District Court misconstrued the order of the Commission and failed properly to evaluate the Commission's findings, (2) whether the District Court failed to respect the doctrines of primary jurisdiction and administrative finality, and (3) whether the District Court erred in interpreting and in applying to the evidence in this case the provisions of the Interstate Commerce Act and of the National Transportation Policy.

ARGUMENT

The Jurisdictional Statement has fully set forth the essential bases which we believe warrant full briefs and argument in this Court, and no purpose would be served in repeating those considerations. We shall confine ourselves here to correcting several misapprehensions which appellees appear to have as to the nature of the issues, the action of the Commission, and our own position on these matters.

1. Our Jurisdictional Statement (pp. 9-10) demonstrated that the District Court had misconstrued the Commission's order in stating that the Commission "prescribed" a parity of rates from Baltimore and Philadelphia and that this misunderstanding led the District Court into serious error in determining whether the decision of the Commission should be sustained. Appellees Baltimore

and Ohio and Western Maryland, while not denying the significance of such a misunderstanding, are now driven to contend that the word "prescribe" describes the substance of what the Commission did, for, they say, the Commission required or "prescribed" a parity by approving rates from Philadelphia equal to the Baltimore rates and by disapproving lower rates from Baltimore (pp. 12-13).

The fallacy of that position is exposed ten pages later in the same document. With respect to the New York rate, which was also published at the Baltimore level, and also approved by the Commission, those appellees assert that "the only action taken by the Commission was to approve [such rate] as 'just and reasonable' under Section 15(7)" and that "The Commission did not prescribe parity as a principle" (pp. 23-24). Moreover, with respect to the rates from Baltimore and Philadelphia, it cannot be denied that the lower court affirmed the Commission's finding that the reduced Baltimore rates were not shown to be just and reasonable, from which affirmance said appellees did not appeal.

Despite appellee's contradictory interpretations of what the Commission did, the fact remains that the lower court stated in so many words that the order of the Commission "prescribed" a parity of rates from Baltimore, Philadelphia and New York, and then proceeded to determine whether the Commission was right in so prescribing such relationship. In so doing, the court ignored the fact that the Commission merely passed on the validity of carrier-initiated rates under Section 15(7), and that, as shown in appellant's Jurisdictional Statement, the Commission considered and applied accepted standards, and made adequate basic findings with respect thereto, in reaching its ultimate findings that the Philadelphia rate was just and reasonable and that the reduced Baltimore rate was not shown to be so. See *New York Cent. R. Co.* v. *United States*, 99 F. Supp. 394, 398-399, affirmed 342 U. S. 890.

Nor are appellees successful in excusing this fundamental error by the lower court through the argument that the controversy herein turns on port relationships.[1] Our Jurisdictional Statement (pp. 10-12) showed how the lower court erred in holding that the Commission had struck down a long-established differential in favor of Baltimore to divert traffic to the other ports and in the effect given by the court to such interpretation of the Commission's decision. Appellees' motions in no way refute this showing of error. Certainly, the continuous repetition of the words "traditional differential", as it appears in appellees' motions, is of no significance here.

Appellees Baltimore and Ohio and Western Maryland attempt to rebut appellant's statement that the port differential adjustment has not applied to low-grade, heavy loading, raw materials moving in volume in open-top cars, such as iron ore, coal and coke, by referring to past rate proposals applying the differential to import iron ore rates, which they say the Pennsylvania has sponsored, citing the testimony of a Western Maryland witness (13). Upon cross-examination, this witness was forced to admit that said rate proposals related, not to movements in volume of iron ore to blast furnaces, but to sporadic small movements to other than steel producing plants for use such as making a coating for welding rods (I. C. C. Rec. at 678-686). Iron ore rates, involving large and regular movements, like coal and coke, have always been made on bases different from those affecting merchandise traffic, and have never been made to reflect port differentials (I. C. C. Rec. at 747).

What appellees would ignore is that the rates in issue before the Commission were new rates, occasioned by a change in the movement of iron ore to the destinations involved (see appellant's Jurisdictional Statement, pages 4-7). In fact, from the appellees Maryland Port Authority and Baltimore Association of Commerce motion it would

[1] Motion of B. & O. and W. Md. at pp. 8, 12-13; Md. Port Auth. at 4.

appear that the Baltimore rates which the Pennsylvania sought to equalize from Philadelphia had been in effect for a long time (5), instead of only 28 months before the Pennsylvania's tariff was published to become effective. The traffic was new traffic and the Pennsylvania initiated rates to participate in it as it was entitled to do. *New York Cent. R. Co.* v. *United States, supra,* at 398. It was the lawfulness of such carrier-initiated rates upon which the Commission decided. In so doing it did not "prescribe" a rate parity nor did it "strike down" a port differential rate adjustment.

2. Appellees Baltimore and Ohio and Western Maryland state that this appellant argued that the District Court would require rate relationships to be governed by differences in distance, and claim that the decision of the lower court was misunderstood (13). Our argument was apparently misunderstood. At the part of this appellant's Jurisdictional Statement to which appellees made reference, appellant argued that the District Court had usurped the administrative function in making findings contrary to those of the Commission regarding the weight to be accorded to differences in distances from Philadelphia and Baltimore to the destination territory (Juris. St., p. 14).

The District Court held that the finding of the Commission as to distances from Philadelphia and Baltimore was that the difference is so insignificant that the service from both ports is substantially identical, and that support for this finding is lacking (151 F. Supp. 258, 275). The court characterized the Commission's decision as finding that the distances via the Pennsylvania from Baltimore and Philadelphia, reflecting a difference of 11 miles, were controlling. The Commission's decision is not susceptible of such interpretation.

While the Commission found that the service over the Pennsylvania is substantially identical from both Phila-

delphia and Baltimore, it also found that the average short-line distance from Philadelphia to the Youngstown area exceeds that from Baltimore by only 11.6 percent and that the difference is less when actual working routes are considered (299 I. C. C. 195, 208). Despite these findings the lower court persisted in referring to the "natural advantages" of Baltimore from a distance viewpoint (151 F. Supp. 258, 272), to which appellees' motions make repeated reference. The Commission found that such differences in distance had no significance rate-wise, either with respect to the reasonableness of the Philadelphia rates or in considering whether they were unduly prejudicial. The court's holdings with respect to distance not only misinterpret what the Commission found but also constitute a substitution of its judgment for that of the administrative body.

Appellees Baltimore and Ohio and Western Maryland assert (14) that instead of requiring adherence to comparative distances, the District Court's remand is for a different purpose, namely, "to determine whether the Commission's according of parity rates to Philadelphia gives to the Pennsylvania a rate lower than necessary to meet the competition under Section 1(5) and to the port itself a rate which is unduly preferential and thus in violation of Section 3(1)." The same argument is advanced by the other appellees. Appellees assert that a shorter ocean distance from Labrador to Philadelphia added to an equal rate to Baltimore inland gives Philadelphia a material competitive advantage, which the District Court would guard against "particularly since there is no justification from a transportation standpoint for a lower rate (distance considered) from Philadelphia" (14-15).

The purpose of the court's holdings with respect to distances is so revealed. In other words, treating this case as a port relationship case—instead of one where, as here, the issue was the lawfulness of carrier-initiated rates—the court has accorded greater weight to differences in

distances, Philadelphia compared with Baltimore, than the Commission in its administrative capacity found that they were entitled. In so doing the court questioned the lawfulness of the Philadelphia rate because of its longer distance from Baltimore to the destination territory and its shorter distance than Baltimore from a particular origin source, Labrador.

On the issue of the reasonableness of carrier-initiated rates under Section 1(5), the Commission found the differences in distances inland from Philadelphia and Baltimore *de minimis*. In so doing, it considered earnings and distances, comparisons with other rates and, pursuant to the requirement of Section 15a(2), the effect of the proposed Philadelphia rates on the movement of traffic. In all instances it found that the Philadelphia rates favorably met these criteria (291 I. C. C. 527, 553, 554). That the proposed Philadelphia rates were no lower than necessary to meet competition is implicit in the Commission's finding that iron ore will not move through Philadelphia to the interior on rates higher than those prevailing from Baltimore. With respect to Section 3(1), the Commission found that the differences in distances from Philadelphia and Baltimore are so inconsequential that a parity of rates would not result in undue prejudice (291 I. C. C. 527, 554). These findings were confirmed by its report and order of October 1, 1956.

Throughout their motions appellees stress the importance of Labrador ore. In fact, they would, in effect, confine this case to that origin. That is what the lower court did, when it undertook to find that iron ore from Labrador will dominate the situation and that under a parity of rates Labrador ore will move through Philadelphia and not through Baltimore (151 F. Supp. 258, 265). These findings are contrary to those of the Commission (291 I. C. C. 527, 554; 299 I. C. C. 195, 197, 200, 202-3, 209). While Labrador ore is important, the rates here involved also apply to iron ore from numerous other foreign

sources, all of which was considered by the Commission in reaching its decision. This included due consideration of past and future tonnages from Labrador, from which the Commission found that iron ore tonnage through Baltimore will probably continue to increase even though a rate parity is maintained at Philadelphia (299 I. C. C. 195, 209). In so finding the Commission had under consideration the matter of ocean distances and costs (299 I. C. C. 195, 198).

Appellees Baltimore and Ohio and Western Maryland argue that the purpose of the remand is to enable the Commission to determine whether a parity of rates puts Philadelphia at a competitive advantage "in disregard of the fact that by the transportation standard Baltimore has the geographical advantage" (20). But the Commission has found that the differences in distance from Philadelphia and Baltimore are of no consequence transportation-wise. Also, the Commission has specifically found, as just noted, with the facts of ocean transportation before it, that no undue preference or prejudice will result from a parity of rates.

In a recent decision, *Iron Ore, Ex-Labrador, Canada to Youngstown, Ohio Area*, Investigation and Suspension Docket No. 6742, ——— I. C. C. ———, decided October 25, 1957 (mimeographed), in which the question of ocean costs from Labrador to Philadelphia and Baltimore was injected by these appellees, the Commission found the uncontroverted testimony to be that, regardless of whether the ocean movement from Seven Islands is to Philadelphia or Baltimore, the charge to the shipper for a particular vessel is the same, whether it is controlled by the shipper or is under charter or contract of affreightment (Sheet 13).

Nor is there any deficiency in the record before the Commission with respect to the movement of iron ore through Philadelphia and Baltimore as appellees Baltimore and Ohio and Western Maryland would assert

(21-22). The Commission had before it all the tonnages up to December, 1954, when the record was closed, including a sufficient sampling of the movement from Labrador which had begun earlier in that year, and it made detailed findings as to such movements (299 I. C. C. 195, 197, 200, 202-3). These findings supported its finding that the tonnage through Baltimore will probably increase even at equal rates with Philadelphia (299 I. C. C. 195, 209).

Appellees assert that the "fervor with which the appellants resist a disclosure suggests that it would not support a parity of rates." In the view of this appellant a record in administrative proceedings should not be held open indefinitely, particularly where, as here, all parties have been given ample opportunity to make a record before the Commission and on the basis of a full record the Commission has made proper basic and ultimate findings. Reference to the two Commission reports shows that they were not "tailored", as alleged by appellee Canton Railroad Company (2). Nor, as claimed by such appellee, did the Commission carefully avoid findings of fact and content itself with a simple conclusion that the rates in question are or are not shown to be just and reasonable (3). Equally without merit is said appellee's characterization of the Commission's decision as a "fast conclusion" (7). Hearings commenced in March, 1953 and were concluded in December, 1954. There were two examiner's proposed reports, a report by Division 2 and a report by the full Commission. In each of these reports the fullest treatment was given to the issues and the evidence and in each instance the proposed rates from Philadelphia were found to be lawful, with no dissent in either of the Commission decisions. It is submitted that the administrative process in this case could not have been more thorough and that it should now be ended despite the effort of the District Court to usurp the administrative function and remand the matter to the Commission for confirmation of its own contrary findings.

3. Regarding the District Court's refusal to accept the Commission's findings that a parity of iron ore rates, Philadelphia with Baltimore, is in accordance with the National Transportation Policy (Juris. St. 17-19), appellees Baltimore and Ohio and Western Maryland claim that the court had no reason to consider them because competitive need for parity had not first been established (18). They go on to say that "None will argue that a transportation system adequate for national defense, as one of the objectives of the National Transportation Policy, is fostered by unlawful rate relationships."

In so arguing, appellees beg the question and fall into the same error as did the court. The Policy provides that all the provisions of the Interstate Commerce Act shall be administered and enforced with a view to carrying out said declaration of policy. That is what the Commission did here. It cannot be said that in making its findings under the National Transportation Policy the Commission disregarded the requirements of the other sections of the Interstate Commerce Act, as the court and appellees would infer, for, as previously noted, the Commission made requisite findings under Sections 1(5) and 3(1) of that Act. In so doing, the Commission gave consideration both to the National Transportation Policy and to other criteria. As stated in the Commission's report of October 1, 1956, 299 I. C. C. 195, at 209:

> "As stated in the prior report [291 I. C. C. 527, 554], we are required to administer the act so as to carry out the national transportation policy, which has for its ultimate objective the development, coordination, and preservation of a national transportation system adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. Iron ore is a commodity which not only is of importance to the carriers in that it can and should reasonably bear its full share of the transportation burden, but it is of vital im-

portance to the national defense. Thus, it is highly desirable that the carriers be permitted, within lawful bounds, to establish rates which will permit the movement of this traffic through several ports. These matters, among others of record, have been given consideration in reaching our conclusions herein."

Again, it is submitted that in refusing to accept the Commission's finding that a parity of iron ore rates, Philadelphia with Baltimore, is in accordance with the National Transportation Policy, the lower court committed serious error. *Luckenbach S. S. Co.* v. *United States*, 122 F. Supp. 824, affirmed 347 U. S. 984.

CONCLUSION.

For the reasons set forth above and detailed more fully in this appellant's Jurisdictional Statement, it is respectfully submitted that the Motions to Affirm should be denied and that this Court should note probable jurisdiction and thereupon assign this case for oral argument to be implemented by briefs on the merits.

Respectfully submitted,

GUERNSEY ORCUTT,
RICHARD R. BONGARTZ,
Transportation Center
6 Penn Center Plaza
Philadelphia 4, Pennsylvania.

WILLIAM PEPPER CONSTABLE,
GEORGE W. CONSTABLE,
701 Maryland Trust Building,
Calvert and Redwood Streets,
Baltimore 2, Maryland.

Attorneys for The Pennsylvania Railroad Company.